# INDEX



## CITATIONS





702553—46——1

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 128

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, AND CONTRACTORS PACIFIC NAVAL AIR BASES, AN ASSOCIATION, PETITIONERS

*v.*

VARREN H. PILLSBURY, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND WALTER L. WOOD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT PILLSBURY, DEPUTY COMMISSIONER, IN OPPOSITION

### OPINIONS BELOW

The district court wrote no opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 173–175) is reported at 154 F. 2d 559.

### JURISDICTION

The decree of the Circuit Court of Appeals was entered on March 18, 1946 (R. 175). A

petition for rehearing was denied on April 23, 1946 (R. 176). The petition for a writ of certiorari was filed on May 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

### QUESTIONS PRESENTED

1. Whether, in a proceeding to review a compensation order of a Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, a district court is required by Rule 52 (a) of the Federal Rules of Civil Procedure to make findings of fact.

2. Whether, in a proceeding in a district court to review a compensation order under the Longshoremen's and Harbor Workers' Compensation Act, an order of dismissal signed by the district judge, filed as a part of the record in the case and duly noted in the district court civil docket, is a final order.

3. Whether the time permitted by the Act of March 3, 1891, 28 U. S. C. 230, for appeal to a circuit court of appeals must be calculated from the date of the notation of such order of dismissal in the district court civil docket, in the absence of a petition for rehearing or other proceeding subsequent to judgment in the district court seeking to alter the rights already adjudicated.

### STATUTES AND RULES INVOLVED

Relevant statutes and rules of procedure are set forth in Appendix, *infra*, pp. 17–22.

STATEMENT

Respondent Wood injured his back while employed by Contractors Pacific Naval Air Bases at a military base in Hawaii (R. 5–6). As a result of the injury, a serious back condition developed and became apparent on December 23, 1942, and Wood was hospitalized and required extensive medical treatment (R. 6–7). On July 12, 1943, Wood filed a claim for compensation in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) as made applicable to employees at defense base areas by the Defense Bases Act of August 16, 1941, 55 Stat. 622, 42 U. S. C., Supp. IV, 1651–1654 (R. 5, 7). On July 21–23, 1943, and on September 20, 1943, hearings were held before the respondent Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District (R. 52–158). Findings of fact were made by the Deputy Commissioner on April 15, 1944 (R. 5–7), and a compensation order of $953.57, for disability from December 23, 1942, to September 16, 1943, was entered in favor of the respondent Wood.[1]

[1] Earlier findings of fact, order and award in favor of respondent Wood had been made by the Deputy Commissioner on November 6, 1943 (R. 48–50). A proceeding was instituted by petitioners to review the order and award of November 6 but, at the suggestion of the Employees' Compensa-

This proceeding to review the Deputy Commissioner's order of April 15, 1944, was instituted on May 12, 1944, in the District Court of the Northern District of California, Southern Division, in accordance with the procedure set forth in Section 21 (b) of the Longshoremen's and Harbor Workers' Act, *infra*, p. 17 (R. 9–10, 22).[2] On July 11, 1944, a motion to dismiss the proceeding was made on behalf of the Deputy Commissioner on the grounds that his findings of fact were supported by evidence and were, accordingly, final and conclusive, and that the compensation order was in accordance with law (R. 22–23).[3] The case was heard in the district court on December 11, 1944 (R. 168). On December 26, 1944, the district judge granted the motion to dismiss and ordered that the proceeding be dismissed (R. 24). On the same day the order of dismissal, duly signed by the district judge (R. 24), was filed as part of the record in the case and the district

tion Commission, the district court remanded the matter to the Deputy Commissioner for an amendment of the finding of fact with regard to notice of injury (R. 4).

[2] The procedure for judicial review of compensation awards contained in Section 21 (b) is applicable to awards made under the Defense Bases Act of August 16, 1941, *supra*, 42 U. S. C., Supp. IV, 1651. The district court is empowered to set aside the compensation order "if not in accordance with law * * *." Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, *infra*, p. 17.

[3] A certified transcript of the entire record before the Deputy Commissioner was included in the record in the district court (R. 19–20, 21, 23).

court clerk made the required notation in the docket (R. 168).

Subsequently, on February 21, 1945, prepared findings of fact, conclusions of law, and a formal decree were signed by the district judge (R. 24–29). The decree was marked as entered in "Vol. 35 Judg. and Decrees at Page 368" (R. 29, 169).

On April 24, 1945, petitioners appealed from the "decree" of February 21, 1945 (R. 30–31).[4] The principal point on which petitioners sought review was the alleged failure of respondent Wood to file his claim for compensation within the time permitted by statute (R. 33, 34).

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[4] This proceeding was instituted in the district court by the filing of a libel and the appeal was taken under appellate procedure applicable to admiralty cases. Petitioners, on April 24, 1945, petitioned for leave to appeal from the decree of February 21, 1945 (R. 30–31). An order was made by the district judge on the same day allowing an appeal from "* * * a final decree and judgment heretofore made * * *" in the case (R. 31). The further formal perfecting of the appeal was in accordance with admiralty rules (R. 32–42). However, the petition for certiorari properly treats the case, insofar as rules of procedure are involved, as a civil proceeding governed by the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure are specifically applicable to judicial review under the provisions of Section 21 of the Longshoremen's and Harbor Workers' Act, *supra*. F. R. Civ. P., Rule 81 (a) (6), as amended. The propriety of the application of the Federal Rules of Civil Procedure to such review proceedings is treated more fully in our brief in opposition in *J. E. Haddock, Ltd., et al.* v. *Pillsbury, Deputy Commissioner, et al.*, No. 158, this Term.

Respondents suggested lack of jurisdiction to the court below on the ground that the dismissal order of December 26, 1944, was final and that petitioners' time for appeal had accordingly expired on March 26, 1945. This jurisdictional objection was sustained and the appeal was dismissed on March 18, 1946 (R. 175).

## ARGUMENT

The district court order of dismissal on December 26, 1944, was clearly a final decision, appealable to the court below. Petitioners' time to appeal began to run on the same day, the date of notation of the dismissal order in the district court civil docket, and expired on March 26, 1945. Accordingly, the court below correctly dismissed petitioners' appeal, taken on April 24, 1945, as out of time. Petitioners here seek to recapture their lapsed statutory privilege of appeal by attacking the December 26 order on the ground of asserted deficiencies of form. From this, they argue that the "decree" of February 21, 1945 must be considered the final decision in the proceeding for the purpose of computing the appeal period. Petitioners do not contend that the substantive effect of the December 26 order was in any way varied or affected by the "decree" of February 21. In an effort to acquire substantive content for their position, petitioners assert that the decision below deprives them of findings of fact by the district judge to which they claim a right under Rule 52 (a) of the Rules of Civil

Procedure. We submit that petitioners' finding-of-fact argument is illusory and that such formal differences as existed between the December 26 order and the decree of February 21 are immaterial to the issue here presented.

1. *In an action to set aside the order of a Deputy Commissioner, the district court is not required to make findings of fact.*—Petitioners attack the holding of the court below on the ground that it deprives them of the findings of fact to which they have a "right" by virtue of Rule 52 (a) of the Rules of Civil Procedure (Pet. 6–7, 8, 14–18). The short answer to this argument is that the district court does not sit as a trier of fact in proceedings brought to review administrative orders or findings and that such proceedings are not "* * * tried upon the facts without a jury * * *" within the meaning of Rule 52 (a). On the contrary, the sole question presented to the district court herein was a question of law, namely, whether the findings of the deputy commissioner were supported by evidence and the compensation order "* * * in accordance with law * * *."[5] Section 21

[5] On appeal, the same question would be presented on the same record, *i. e.*, the record before the district court. The extent to which appellate review might be impeded by district court findings is illustrated by a comparison of the prepared findings herein (R. 25–26) with the original findings of the deputy commissioner (R. 48–50) and his corrected findings (R. 5–7), particularly with regard to notice of injury by respondent Wood, a point as to which petitioners assigned error to the court below (R. 34).

702553—46——2

(b) of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. 921 (b), *infra*, p. 17; cf. *Yakus* v. *United States*, 321 U. S. 414, 437; *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U. S. 163, 170; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177; *Interstate Commerce Comm.* v. *Louisville and Nash. R. R.*, 227 U. S. 88, 92 Rule 52 (a) does not enlarge the power of district courts in proceedings of this kind nor does it modify the substantive principles of the above cited cases. The duty of finding the facts in compensation proceedings has been committed to the administrative body and an independent exercise of judgment on factual issues by a reviewing district court would be improper. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

The precise contention made by petitioners herein with regard to their "right" to independent findings of fact by the district court was recently before this Court in *Texas Electric Ry. Co.* v. *Eastus*, 308 U. S. 512. There a three-judge court, convened to review an order of the Interstate Commerce Commission, had specifically refused to make independent findings of fact on the ground that the power to make such findings had been lodged in the Interstate Commerce Commission by statute and that the sole function of the court was to determine whether the Commission's findings were legally made and supported by substantial evidence (R. 241, No.

31, Oct. T. 1939). The appellant excepted to this action on the ground that the court had not found the facts specifically as required by Rule 52 (a), F. R. Civ. P. (R. 243, No. 31, Oct. T. 1939). The point was specified as error in the appellant's brief (R. R. Br. 13, No. 31, Oct. T. 1939) and was briefed and argued by the Government (Appellees' Br., 32–35, No. 31, Oct. T., 1939). This Court affirmed the decision of the three-judge court.

We submit, accordingly, that a district judge has no duty to make findings of fact under Rule 52 (a) in cases involving review of administrative action where the administrative agency is itself required to find the facts.

2. *The order of dismissal of December 26, 1944 was a final decision, appealable to the court below.*—Circuit courts of appeals are empowered by Section 128 of the Judicial Code, 28 U. S. C. 225, *infra*, p. 17, to review final decisions of district courts. Finality is the crucial factor which gives rise to this appellate power and to the privilege of invoking it; finality exists where the decision adjudicates the right of the parties (*Department of Banking* v. *Pink*, 317 U. S. 264, 268) and terminates the particular cause. *Ex parte Tiffany*, 252 U. S. 32; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Weston* v. *City Council*, 2 Pet. 449.[6]

[6] Petitioners' effort to find some telling distinction between "order" and "judgment" or "decree" is without merit or substance. For the purpose of the issue presented herein, the

An order which dismisses an action is such a final decision. *Wilson* v. *Republic Iron Co.*, 257 U. S. 92, 96; *Vietti* v. *Wayne*, 136 F. 2d 771 (App. D. C.); *Jefferson Electric Co.* v. *Sala Electric Co.*, 122 F. 2d 124 (C. C. A. 7); *Hicks* v. *Bekins Moving and Storage Co.*, 115 F. 2d 406 (C. C. A. 9); *Bailey* v. *Crump*, 41 F. 2d 733 (C. C. A. 4).

The order of December 26 was not, as petitioners appear to contend, an order which merely sustained respondent Pillsbury's motion to dismiss. On the contrary, it was clearly an order which dismissed the proceeding.[7] As such, it was final and appealable. Under Rule 41 (b), F. R. Civ. P., *infra*, p. 18, the dismissal operated as an adjudication upon the merits.[8] Moreover,

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terms are interchangeable so long as the requisite finality is present. *Cf.* Rule 54 (a), F. R. Civ. P.; *Department of Banking* v. *Pink*, *supra*, at 266, 268; *Ex parte Tiffany*, *supra*, at 36.

[7] *City and County of San Francisco* v. *McLaughlin*, 9 F. 2d 390 (C. C. A. 9), and *Wright* v. *Gibson*, 128 F. 2d 865 (C. C. A. 9), cited by petitioners, fully support the action of the court below herein. In both cases, the Ninth Circuit Court of Appeals carefully distinguished between an order which merely granted a motion to dismiss and an order of dismissal. In both cases, an attempted appeal from an order granting a motion to dismiss was held premature, but full recognition was given to the appealability of an order or dismissal. Cf. *Monarch Brewing Co.* v. *George J. Meyer Mfg. Co.*, 130 F. 2d 582 (C. C. A. 9).

[8] Petitioners criticize the December 26 order for failing to state that the dismissal was "* * * without leave to amend * * *" (Pet. 7). The force of Rule 41 (b) is exactly contrary to this position. Under the rule, any involuntary dismissal (other than for lack of jurisdiction or

if the dismissal had left the merits undetermined, the order was nonetheless final and appealable. *Wilson* v. *Republic Iron Co., supra,* at 96; *Weston* v. *City Council, supra.* Nor was there any petition for rehearing or other proceeding in the district court subsequent to December 26, 1944, which in any way affected or sought to affect the rights adjudicated by the December 26 order. Cf. *Department of Banking* v. *Pink, supra,* at 266–267.

3. *Petitioners' time within which to appeal expired on March 26, 1945.*—The Act of March 3, 1891, 26 Stat. 826, 829, as amended, 28 U. S. C. 230, *infra,* pp. 17–18, permits an appeal to a circuit court of appeals from a final decision of a district court only if the appeal be taken within three months from the entry of the district court judgment. Under Rule 58 of the Rules of Civil Procedure, *infra,* p. 19, the notation of a judgment in the civil docket as provided by Rule 79 (a), *infra,* pp. 19–20, constitutes the entry of the judgment.

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improper venue) automatically operates as an adjudication upon the merits unless the court in its order otherwise specifies. A somewhat related objection, that the December 26 order failed to state that the compensation order was affirmed (Pet. 7), is similarly without merit. The dismissal under Rule 41 (b) fully sufficed to affirm the deputy commissioner's action. Further, we believe the involuntary dismissal to be the correct procedure since a reviewing district court is only empowered to set aside a compensation order if not in accordance with law.

As shown above, the December 26 order was final and appealable. It was, accordingly, a judgment under Rule 54 (a) of the Rules of Civil Procedure, *infra,* p. 18. Signed by the district judge,[9] it was filed by the district court clerk on December 26, 1944, and, on the same day, was noted by the clerk in the civil docket. Thus, pursuant to Rule 58, *infra,* p. 19, judgment was entered on December 26 and the three month period allowed to petitioners within which appeal to the court below expired on March 26, 1945.

There is no merit to petitioners' various attacks on the form of the December 26 order, nor do these attacks in any wise destroy or change the character of that order as final. Primarily, petitioners criticize the December 26 order for failure to conform to the provisions, as to settlement and approval, of Rule 5 (d) of the Rules of Practice of the District Court for the Northern District of California, *infra,* pp. 21–22 (Pet. 8). The provisions of Rule 5 (d) come into play only in connection with orders which require settlement and approval. Pursuant to Rule 58, F. R. Civ. P., the December 26 order, an order directing that there be no recovery, is not an order or judgment

[9] By Rule 5 (c) (3) of the Rules of Practice of the United States District Court for the Northern District of California, *infra,* p. 21, the district judge's direction to enter judgment is evidenced by his signature on the order where, as here, the direction was not given to the clerk in open court and accordingly noted in the minutes.

which requires settlement and approval as to form. Obviously, the provisions of Rule 5 (d) are inapplicable herein.

Petitioners also attack the December 26 order for failure to provide for the payment of costs, provision for which is contained in the formal decree of February 21. The failure to provide for costs or for other ministerial matters has never been held to effect the character of an order as final. *Fowler* v. *Hamill,* 139 U. S. 549; *Sizer* v. *Many,* 16 How. 98; *Johnson* v. *Wilson,* 118 F. 2d 557 (C. C. A. 9); *Allis-Chalmers Co.* v. *United States,* 162 Fed. 679 (C. C. A. 7); *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co.,* 84 Fed. 213 (C. C. A. 2); *Craig* v. *The Hartford,* 1 McAll. 91, Fed. Case No. 3333 (C. C. D. Cal.). Recognition of the ministerial nature of the taxation of costs is shown in Rule 54 (d), F. R. Civ. P., *infra,* p. 19, which provides that costs may be taxed by the clerk on one day's notice, and by Rule 5 (c) (1) of the local rules of the Northern District of California, *infra,* pp. 20–21, which specifically direct that the notation of judgment by the clerk in the civil docket shall not be delayed pending taxation of costs.

Petitioners set forth certain other minor criticisms, such as the failure of the December 26 order to state the date of trial and to set forth the "* * * character of the evidence

used * * *"[10] (Pet. p. 7). These contentions are obviously immaterial in considering the finality of the order.[11] In essence, petitioners are attempting to establish the formal decree of February 21 as the final decision in the proceeding without showing any substantive difference in effect between that decree and the order of December 26. They rely principally on the circumstance that the February 21 decree was entered in "Vol. 35, Judg. and Decrees, at page 368 * * *" (Pet., p. 8). In other words, petitioners' arguments lead to the proposition that there were two final orders in the district court, and that they were entitled to calculate their appeal period from the second order, which happened to be later in time and hence extended the appeal time. Such a contention necessarily raises questions as to the power of a district judge, or of the parties to a proceeding, to extend the statutory appeal period by action which in no way changes the substantive effect of an earlier final order or decree (*United States* v. *Rayburn*, 91 F. 2d 162 (C. C. A. 8); *United States* v. *Hall*, 83 F. 2d 94 (C. C. A. 1)) or of the propriety of the issuance by a district judge of subsequent unnecessary and confusing orders. Cf. *Mosier* v.

[10] As already noted, the "evidence" in proceedings of this type consists solely of the record before the compensation commissioner in the proceeding under review.

[11] Two further criticisms of the December 26 order are discussed above in note 8, pp. 10–11.

*Federal Reserve Bank,* 132 F. 2d 710 (C. C. A. 2). However, we do not believe that a proper understanding of the nature of the February 21 decree requires consideration of such questions. Traditionally, a "judgment docket" has been maintained in federal district courts for the convenience of parties seeking to check lien records or to search for similar information. See *Polleys* v. *Black River Co.,* 113 U. S. 81. Such judgment books are "* * * made up necessarily after the main judgment * * *." *Polleys* v. *Black River Co., supra,* pp. 83–84. The practice of keeping such a record is continued by Rule 79 (b), F. R. Civ. P., *infra,* p. 20, which requires district court clerks to keep a "civil order book" in which exact copies of final judgment and orders are to be kept. This "civil order book" is not the civil docket maintained under Rule 79 (a) nor is the entry of a formal decree in the civil order book the same as that notation in the civil docket under Rule 79 (a) which constitutes the entry to judgment. We submit that the formal decree of February 21 was prepared for use in the civil order book maintained by the district court clerk under Rule 79 (b) and that it did not in any sense extend petitioners' time to appeal. *Fowler* v. *Hamill,* 139 U. S. 549; *Polleys* v. *Black River Co.,* 113 U. S. 81; *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co.,* 84 Fed. 213 (C. C. A. 2).

## CONCLUSION

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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JULY 1946.

# APPENDIX

## 1. STATUTES

A. Section 21 (b) of the Longshoreman's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, as amended, 33 U. S. C. 921 (b), provides in pertinent part:

> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District).

B. Section 128 of the Judicial Code, 28 U. S. C. 225, provides in pertinent part:

> Appellate jurisdiction—
> (a) *Review of final decisions.*—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

C. The Act of March 3, 1891, c. 517, Sec. 11, 26 Stat. 829, as amended, 28 U. S. C. 230 provides:

*Time for making application for appeal.*—No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

2. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 41 (b) provides:

(b) *Involuntary Dismissal: Effect Thereof.*—For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

B. Rule 54 (a) provides:

(a) *Definition; Form.*—"Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

C. Rule 54 (d) provides:

> (d) *Costs.*—Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

D. Rule 58 provides in pertinent part:

> *Entry of Judgment.*—* * * When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

E. Rule 79 (a) provides:

> (a) *Civil Docket.*—The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions

upon each other party, and lodge the original and one copy with the Clerk. Each party who disapproves the order or judgment shall have five days within which to serve and lodge with the Clerk proposed modifications thereof. If all parties approve, or if no modifications are presented within said five days, the order or judgment, if approved by the Judge, shall be signed and filed by him. If any proposed modifications of the order or judgment are presented as herein provided, the Judge shall order such modifications made as he deems proper. If the attorney for the prevailing party fails to observe the above provisions, any attorney in the case may submit to the Judge a draft of the proposed order or judgment.

U. S. GOVERNMENT PRINTING OFFICE: 1946